

EXHIBIT A

H. TIM HOFFMAN, (State Bar No. 49141)
 ARTHUR W. LAZEAR, (State Bar No. 83603)
 ROSS L. LIBENSON, (State Bar No. 181912)
 HOFFMAN & LAZEAR
 180 Grand Avenue, Suite 1550
 Oakland, CA 94612
 Telephone: (510) 763-5700
 Facsimile: (510) 835-1311

MARK R. THIERMAN, (State Bar No. 72913)
 LEON GREENBERG, (State Bar No. 226253)
 THIERMAN LAW FIRM
 7287 Lakeside Drive, Suite 101
 Reno, NV 89511
 Telephone: (775) 284-1500
 Facsimile: (775) 703-5027

MAX FOLKENFLIK
 FOLKENFLIK & MCGERITY
 1500 Broadway, 21st Floor
 New York, NY 10036
 Telephone: (212)757-0400
 Facsimile: (212)757-2010

Attorneys for Plaintiffs David Ho,
 Sarah Fernandez and Michelle Richards
 and Interim Lead Counsel

UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 (San Jose Division)

DAVID HO, on behalf of himself and all others)
 similarly situated and on behalf of the general)
 public and DOES #1-20)
 Plaintiff,)
 v.)
 ERNST & YOUNG, LLP)
 Defendants.)

Case No. C 05 04867-JF (HRL)
 (Consolidated for Class Certification
 Purposes with Case Nos. C-08-4988-JF
 and C-08-2853-JF)

**PLAINTIFFS' MOTION FOR CLASS
 CERTIFICATION PURSUANT TO
 RULE 23**

Date: December 17, 2010
 Time: 9:00 a.m.
 Dept.: 3
 Judge: Hon. Jeremy Fogel

TABLE OF CONTENTS

	Page(s)
Table Of Authorities	iii
Memorandum Of Points and Authorities.....	1
I. Introduction.....	1
II. Statement Of The Case	2
A. Procedural Background.....	2
B. The Five Job Categories For Which Certificate is Sought	3
C. The Legal and Professional Framework	4
1. Statutory, Regulatory and Professional Requirements	4
D. EY's Internal Policies and Practices	6
1. Additional Restrictions Imposed on Staff and Seniors in Audit	6
2. Restriction Imposed on Tax Staff and Seniors	8
E. Tasks and Responsibilities of Staff and Seniors	8
1. Staff and Seniors in Audit.....	9
2. Staff and Seniors in Tax.....	11
3. FMAs	13
III. Legal Argument - The Requirements Of Rule 23 Are Satisfied Here.....	14
A. Satisfaction Of Rule 23(a)	14
B. This Matter Satisfies The Certification Requirements of Rule 23(b)(3)	17
1. Common Proof Establishes EY Uniformly Classifies Staff and Senior As Exempt	18
2. Common Proof Demonstrates Employer Expectations	19
3. Common Proof Demonstrates that None of the Statutory Exemptions Apply	19
(a) None of the Class Members Customarily and Regularly Exercise Discretion and Independent Judgment	19

1	(b) Common Proof Demonstrates The Other	
2	Requirements of Professional Exemption	
3	Cannot Be Satisfied.....	21
4	(c) Common Proof Establishes The Other	
5	Requirements of Administrative Exemption	
6	Cannot Be Satisfied.....	22
7	4. Common Proof Establishes The Other	
8	Requirements of the Executive Exemption	
9	Cannot be Satisfied	25
10	5. Other Common Issues Predominate.....	26
11	C. Class Resolution Is Superior.....	26
12	IV. Conclusion	29

TABLE OF AUTHORITIES**Page(s)****FEDERAL CASES**

<i>Abron v. Black & Decker (U.S.), Inc.,</i> 654 F.2d 951 (4 th Cir.1981)	27
<i>Alba v. Papa John</i> 2007 U.S. Dist. Lexis 28079 at *38-39.....	18
<i>Amchem Products, Inc., v Windsor,</i> 521 U.S. 591 (1997).....	18
<i>Armstrong v. Davis,</i> 275 F.3d 849 (9 th Cir. 2001)	15, 16
<i>Bates v. United Parcel Service of America, Inc.,</i> 204 F.R.D. 440 (N.D. Cal. 2001).....	14
<i>Blackie v. Barrack,</i> 524 F.2d 891 (9 th Cir. 1975)	26
<i>Brady v. Deloitte & Touche LLP,</i> Case No. C 08-00177 SI, 2010 U.S. Dist. Lexis 37820 (N.D. Cal. 2010) (March 23, 2010)	<i>passim</i>
<i>Bratt v. City of Los Angeles,</i> 912 F. 2d 1066 (9 th Cir. 1990)	23
<i>Brock v. On-Shore Quality Control Specialists, Inc.,</i> 107 Lab. Cas. ¶134, 1987 WL 31308 (W.D. Tex. 1987).....	20
<i>Campbell v. PricewaterhouseCoopers, LLP,</i> 253 F.R.D. 586 (E.D. Cal. 2008)	1, 18, 22
<i>Dalheim v. KDFW -TV,</i> 918 F. 2d 1220 (5 th Cir. 1990)	25
<i>Damassia v. Duane Reade, Inc.,</i> 250 F.R.D. 152 (S.D.N.Y. 2008)	21
<i>Dukes v. Wal-Mart Stores, Inc.,</i> 603 F.3d 571 (9 th Cir. 2010)	14, 17, 18
<i>Eisen v. Carlisle & Jacquelin,</i> 417 U.S. 156 (1978).....	17
<i>Gen. Tel. Co. of Sw. v. Falcon,</i> 457 U.S.147 (1982).....	18

1	<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9 th Cir. 1988)	14, 17, 21
2	<i>Hashop v. Rockwell Space Operations Co.</i> , 867 F. Supp. 1287 (SD Tex. 1994.)	25
3	<i>Hodgson v. Penn Packaging Co.</i> , 335 F.Supp. 1015 (E. D. Penn. 1971)	23, 25
4	<i>In re Seagate Technologies II Securities Litigation</i> , 843 F.Supp. 1341 (N.D. Cal. 1994)	28
5	<i>In re Sugar Industry Antitrust Litigation</i> , 73 F.R.D. 322 (E.D.Pa.1976).....	28
6	<i>Klay v. Humana, Inc.</i> , 382 F.3d 1241 (11 th Cir.2004)	28
7	<i>Romero v. Producers Dairy Foods, Inc.</i> , 235 F.R.D. 474 (E.D.Cal.2006)	18
8	<i>Rothman v. Publicker Industries, Inc.</i> , 201 F.2d 618 (3d Cir. 1953).....	23
9	<i>Scott v. Aetna Services, Inc.</i> 210 F.R.D. 261 (D. Conn. 2002).....	27
10	<i>Shaw v. Prentice Hall</i> , 977 F.Supp. 909 (S. D. Ind. 1997).....	21
11	<i>Staton v. Boeing Co.</i> , 327 F.3d 938 (9 th Cir. 2003)	16
12	<i>Tierno v. Rite Aid Corp.</i> , 2006 U.S. Dist. Lexis 71794.....	18
13	<i>United Steel Workers v. ConocoPhilips Co.</i> , 593 F.3d 802 (9 th Cir. 2010)	17, 18
14	<i>Valentino v. Carter-Wallace, Inc.</i> , 97 F.3d 1227 (9 th Cir. 1996)	27, 28
15	<i>Wamboldt v. Safety-Kleen Systems, Inc.</i> , 2007 U.S. Dist. Lexis 65683 (N.D.Cal.2007).....	21
16	<i>Wang v. Chinese Daily News, Inc.</i> , 231 F.R.D. 602 (C.D. Cal. 2005)	17
17	<i>Westways World Travel, Inc. v AMR Corp.</i> , 218 F.R.D. 223 (C.D. Cal. 2003).....	18

1	<i>Whiteway v. Fedex Kinko,</i>	
	2006 U.S. Dist. Lexis 69193 at *19-20.....	21
2	<i>Zinser v. Acccufix Research Inst., Inc.,</i>	
3	253 F.3d 1180 (9 th Cir. 2001)	14, 28
4	STATE CASES	
5	<i>Bell v. Farmers Insurance Exchange,</i>	
6	115 Cal. App. 4 th 715 (2004)	23, 24
7	<i>Cicairos v. Summit Logistics, Inc.,</i>	
8	133 Cal.App.4th 949,954-955 (2005)	26
9	<i>Cortez v. Purolator Air Filtration Products Co.,</i>	
	23 Cal.4th 163 (2000)	26
10	<i>Gentry v. Superior Court,</i>	
11	42 Cal.4th 443 (2007)	27
12	<i>Ghoury v. Al-Lahham,</i>	
	209 Cal.App.3d 1487 (1989)	26
13	<i>Nordquist v. McGraw-Hill Broadcasting Company, Inc.,</i>	
14	32 Cal. App. 4 th 555 (1995)	20, 21, 23
15	<i>Sav-On Drug Stores, Inc., v. Sup. Ct.,</i>	
16	34 Cal.4th 319 (2004)	18
17	STATUTES	
18	Fed. Rule Civ. Proc. 23	<i>passim</i>
19	29 C.F.R. § 541.207	25
20	Cal. Bus. & Prof. Code § 5053	5
21	Cal. Business & Professions Code § 17200.....	26
22	Cal. Business and Professions Code Section 5051	4
23	Cal. Labor Code § 203	15, 26
24	Cal. Labor Code § 218.6	15, 26
25	Cal. Labor Code § 226	15, 26
26	Cal. Labor Code § 515	19, 21, 22
27	Cal. Code Regs., Tit. 8, § 11040(1)(A)(1)(d)	19
28		

1	Cal. Code Regs., Tit. 8 § 11040	22, 23
2	Cal. Code Regs., Tit. 8, § 11040(1)(A)(2)(b)	19
3	Cal. Code Regs., Tit. 8, § 11040(1)(A)(3)	21
4	Cal. Code Regs., Tit. 8, § 11040(1)(A)(3)(c)	19
5	Cal. Dept. of Labor Standards Enforcement Manual (2002 update) §52.3.12	20
6	OTHER AUTHORITIES	
7	8 Alba Conte & Herbert B. Newberg, <i>Newberg on</i>	
8	<i>Class Actions</i> at 24-149 (4 th ed. 2002)	16

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on **December 17, 2010 at 9:00 a.m.**, in the courtroom of the Honorable Jeremy Fogel, 280 S. First Street, San Jose, CA 95113, of the above-mentioned Court, Plaintiffs Sarah Fernandez and Michelle Richards pursuant to Rule 23 of the Federal Rules of Civil Procedure will and hereby do move for an Order, as follows:

1. Certifying a class of all persons employed by Defendant Ernst & Young, LLP in the State of California at any time from September 15, 2001 until the time when class notice may be given (the "Class Period) who:

(1) assisted certified public accountants in the practice of accountancy, as provided for in California Business and Profession Code §§ 5051 and 5053, and (2) were not licensed by the State of California as certified public accountants or attorneys during some or all of this time period and classified as exempt from California Labor Laws, and additionally,

(2) were employed at any time during the Class period in one or more of the following five capacities:

(A) Staff I and II employees in the "assurance" service line of Defendant's business;

(B) Senior I and II employees in the "assurance" service line of Defendant's business;

(C) Staff I and II employees in the "tax" service line of Defendant's business, but excluding persons who were licensed by any state in the United States as attorneys during all of their period of employment in this capacity during the Class Period;

(D) Senior I and II employees in the "tax" service line of Defendant's business, but excluding persons who were licensed by any state in the United States as attorneys during all of their period of employment in this capacity during the Class Period; and

(E) all persons employed by Defendant Ernst & Young, LLP in California from June 19, 2004 until the time when class notice may be given who worked as Finance Management Associates ("FMAs").

1 2. Appointing Hoffman & Lazear, Theirman Law Firm and Folkenflik & McGerity as
2 class counsel; and

3 3. Approving the designation of Sarah Fernandez and Michelle Richards as class
4 representatives. This Rule 23 motion is based upon: this Notice of Motion and Motion; the
5 Memorandum of Points and Authorities, and accompanying declarations and exhibits; Request
6 For Judicial Notice; all pleadings and files in the record herein; and all matters presented to the
7 Court at hearing.

8
9 Dated: August 20, 2010

HOFFMAN & LAZEAR

10
11 By: 

Ross L. Libenson

12 Attorneys for Plaintiffs
13 Sarah Fernandez and Michelle Richards
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Memorandum Of Points and Authorities

I. Introduction.

Defendant Ernst & Young (“EY”) is one of the largest professional service firms in the world and one of the “Big Four” accounting firms in the United States¹. In California, EY currently maintains nine offices employing hundreds in producing the services it offers its clients, including issuing opinions on financial statements and clients’ internal accounting controls (“audit”), and providing advice with respect to International, Federal and Local taxation (“tax”). Significantly, and dispositively for the claims asserted here, the provisions of these audit and tax services are highly regulated by (1) federal and state law, (2) binding professional requirements and (3) EY’s internal policies and practices which incorporate and expand upon those laws and regulations. The statutory, professional and EY requirements control and also limit the activities and use of discretion and independent judgment by EY employees in general, and members of the putative class in particular, who by definition are not licensed Certified public Accountants (“CPAs”).

All class members are required to work substantial overtime hours each year. EY now uniformly classifies them as exempt executives, professionals and/or exempt administrators. Notably, until the mid-1990's all of these groups were classified uniformly as non-exempt. The change to exempt status was made to allow EY to offer a higher base salary (incorporating some payment for overtime) so as to meet the competition for recruiting young employees. EY supposedly justified the change based on some sort of “survey” of the various tasks performed

¹The other Big Four accounting firms are Pricewaterhouse Cooper (PwC), Deloitte & Touche LLP and KPMG. On March 25, 2008, in a similar motion for class certification, the Honorable Larry Karlton of the Eastern District of California certified a class of “Attest Associates,” which are comparable to the Staff in Audit service line seeking class certification herein. *Campbell v. PricewaterhouseCoopers, LLP*, 253 F.R.D. 586 (E.D. Cal. 2008). Likewise, on March 23, 2010, the Honorable Susan Illston of the Northern District of California certified a class of Deloitte’s employees in the audit line of service who were not licensed accountants, or similar to those in the Staff and Senior audit line seeking class certification herein. *Brady v. Deloitte & Touche LLP*, Case No. C 08-00177 SI, 2010 U.S. Dist. Lexis 37820 (N.D. Cal. 2010) (March 23, 2010).

by these employees, a “survey” which EY now asserts it is unable to locate. EY claims that some (but not all) of the tasks performed by class members required “judgment.” EY keeps executive records on nearly every aspect of the work performed by class members, but has no records, analysis or studies that support its claims of exemption.

Plaintiff’s position is a simple one: the unlicensed Staff and Senior titled employees who assist CPA’s, are, under legal, professional and EY internal requirements, subject to multiple layers of detailed supervision. A central issue to be resolved on a class-wide basis is whether this pervasive, invasive and detailed supervision demonstrates the absence of any “discretion or independent judgment,” which Defendant must show in order to meet its burden of proving any exemption.

II. Statement Of The Case.

A. Procedural Background.

On September 27, 2005, Plaintiff Ho filed his complaint seeking unpaid overtime compensation in this matter on behalf of himself and other “similarly titled personnel who performed the same function...” in California. RJN, ¶ 1, Ex. A, Complaint. On August 17, 2007, Plaintiff Fernandez, among others¹, filed the First Amended Complaint (“FAC”), seeking, *inter alia*, unpaid overtime compensation as a result of being improperly classified as exempt on behalf of herself and others in the job position of Staff and Senior in California. RJN, ¶ 2, Ex. B, FAC, ¶ 9. Fernandez worked in EY’s audit function in the Intern, Staff 1 and 2 positions in its Irvine, California office. Fernandez Decl., ¶2.

On February 21, 2008, Plaintiff Landon filed his complaint in the Placer County Superior Court, which was removed and transferred to this Court on June 13, 2008. Landon sought to represent a class of unlicensed “salaried exempt employees doing accounting work” in

¹On March 4, 2008, the Court granted summary judgment as to the claims of David Ho, a licensed attorney. On January 15, 2009, the Court denied summary judgment as to the claims of Sarah Fernandez. Plaintiffs Maxton and Lay were subsequently dismissed January 28, 2008 and March 4, 2008.

California. RJN, ¶ 3, Ex. C, Landon Complaint ¶ 20. Landon worked in EY's audit function in the Staff 1 position in its Roseville, California office. Landon Decl., ¶ 2.

On or about June 19, 2008, Plaintiff Richards filed her complaint in the Sacramento County Superior Court, which was removed and transferred to this Court on November 4, 2008. Richards' complaint sought to represent Staff 1 through Senior 2 and FMA's in California who were improperly classified as exempt from overtime². RJN, ¶ 4, Ex. D Richards' Complaint, ¶ 7. Richards worked in EY's Roseville office as an FMA, a Staff 1, a Staff 2 and a Senior 1 in tax functions and worked in audit functions as a Staff 1 and Senior 1. Richards Decl., ¶¶ 2 and 8; Declaration of Ross Libenson In Support of Plaintiff's Motion For Class Certification. ("LD"), ¶ 3, Ex. A, Richards Tr. Ex. 10, EY_Richards00019 - 00020.

On April 20, 2009, the Court consolidated these three actions for class certification purposes. Dkt. No. 181. On May 7, 2010, the Court approved a stipulation assigning Hoffman & Lazear as interim lead counsel. Dkt. No. 193.

B. The Five Job Categories For Which Certification is Sought.

In California, EY's operations are organized in three practice groups: Tax³; Assurance and Advisory Business Services ("AABS" which is also referred to as "Audit"); and Transaction Advisory Services ("TAS"). RJN, ¶ 5, Ex. E., Hodapp Decl., ¶ 2.

Within the practice groups, the exempt employees are organized in ascending order as follows: Staff 1, Staff 2, Senior 1, Senior 2, Senior Manager and Partners. RJN, ¶ 5, Ex. E.,

²On February 24, 2010, this Court in *Richards* denied in part Defendant's Motion For Summary Judgment as to Ms. Richards' claims regarding overtime compensation, but granted the motion as to a claim for injunctive relief, and dismissed without prejudice the claims for rest and meal break violations while the standard is addressed by the California Supreme Court. Dkt. No. 52. Subsequently, the Court, upon Defendants administrative motions in the consolidated actions, similarly dismissed without prejudice the rest and meal break claims in *Fernandez* (Dkt. #230) and *Landon*. (This was entered as Dkt. #54 in *Richards* but not *Landon*).

Accordingly, the rest and meal break claims are not addressed in this motion, other than to note that it is illuminating that the Defendant treats the individual Plaintiffs similarly with respect to application of the law in a "one size fits all fashion" without any individualized inquiry when it suits their objectives.

³The Tax practice is further divided between Tax Minimization and Tax Operations. Tax Minimization contains three sub-groups: International Tax; Federal Tax; and State and Local Tax, each of which advises clients in understanding and minimizing tax exposures related to business activities outside of the United States, by the Federal government and the state and local entities respectively. Tax Operations is focused on reporting and preparing tax returns. RJN, ¶ 5, Ex. E., Hodapp Decl., ¶ 3.

Hodapp Decl., ¶4; Pham Suppl. Decl. ¶14. Promotion from one level to the next is made annually. LD, ¶4, Ex. B, Altobello⁴Tr., 114:20-23. The lockstep promotions are made after the Staff or Senior employee completes a "busy season." Pham Suppl. Decl., ¶¶ 16 -17; Richards' Suppl. Decl., ¶¶ 22-24, 32-34. EY's "busy season" is traditionally mid-January through April 15, annually, where it is expected the staff and seniors in both tax and audit will work a mandatory fifty-five (55) hour workweek, or eleven (11) hours a day, and they are strongly encouraged to work additional hours in the office on Saturdays. LD, ¶¶ 5 and 6, Ex. C and D, 2006 and 2007 Busy Season Expectations, EY011473 - EY011480. EY also recognizes that many of the Staff and Seniors were working in excess of "fifty +" (50 plus) hours or 55 hours a week both before and after the traditional "busy season." *Id.*, at EY 011474 and EY011478.

To be promoted to manager in the audit and tax service line, EY requires the employee to be a CPA or a licensed attorney. LD, ¶7, Ex. E, EY Policy & Practice Statement ("PPS"), Professional Certifications, EY 050968, and ¶4, Ex. B, Altobello Dep. 115:13 -23; Pham Suppl. Decl. ¶¶ 18-19; Richards Suppl. Decl., ¶35.

C. The Legal and Professional Framework.

1. Statutory, Regulatory and Professional Requirements.

An unlicensed Staff or Senior is restricted in what he or she may do in "assisting" EY's CPA's in providing public accountancy under California laws and professional rules and regulations promulgated by the American Institute of Certified Public Accountants ("AICPA"), California State Board of Accountancy, the Security and Exchange Commission ("SEC"), the PCAOB and the Internal Revenue Service ("IRS"). RJN, ¶6, Ex F, Shlonsky Decl., ¶¶ 4 -7.

California Business and Professions Code Section 5051 provides that no person shall engage in the practice of public accountancy (defined broadly and covering all the work of class members) without first obtaining a license from the state of California. Under Section 5053 an

⁴Ms. Altobello is EY's former Managing Partner for the North America Audit practice and currently Audit's managing partner of the northeast Audit practice, and EY's 30(b)(6) witness on the reason that the Staff and Seniors are classified as exempt.

1 unlicensed individual may “assist” a licensed accountant, but that individual must, “work under
2 the control and supervision of a certified public accountant,...,” Cal. Bus. & Prof. Code § 5053.

3 The rules and regulations of the American Institute of Certified Public Accountants
4 (“AICPA”), which are known as the Code of Professional Conduct, set minimum standards that
5 all public accounting firms must meet. RJN, ¶6, Ex. F, Shlonsky Decl., ¶¶ 8-10. Under the
6 Code, virtually any matter of significance in connection with providing audit related accountancy
7 service must be reviewed and approved by the CPA in charge of the engagement, who must *at*
8 *all times* supervise the unlicensed associates who work on the engagement. *Id.*, ¶¶ 11-15, 29
9 and 30.

10 The California State Board of Accountancy has adopted not only the AICPA Code of
11 Professional Conduct, but also requires adherence to Generally Accepted Auditing Standards
12 (“GAAS”). *Id.*, ¶16. Under GAAS unlicensed individuals may *not*, as a matter of law, plan or
13 direct any audit. *Id.*, ¶ 17. Any work performed by an unlicensed employee must be supervised,
14 which includes being instructed to follow specific audit steps and then having the work
15 reviewed. *Id.*, ¶ 18. If a problem of any significance is encountered, the unlicensed employee
16 may not resolve it. *Id.*, ¶ 19.

17 For public companies, which includes many EY clients, additional rules apply. The SEC
18 refuses to accept a “certification” from an unlicensed accountant, and requires any accountancy
19 partnership to adhere to the AICPA’s Code of Professional Conduct and GAAS. *Id.*, ¶ 20 and
20 21.

21 Under the Sarbanes-Oxley Act of 2002, the regulatory body established for oversight of
22 accounting for public companies, the Public Company Accounting Oversight Board or
23 “PCAOB”), has passed rules which require any unlicensed assistant to follow audit plans, and
24 imposes a “concurring partner” level of review. In addition to review by the Partner in Charge of
25 the audit, *Id.*, ¶¶ 23 -26, IRS rules prohibit a non-licensed individual from practicing before it -
26 and requires adherence to the AICPA’s Code of Professional Conduct and GAAS. *Id.*, ¶¶ 27
27 and 28.

1 D. EY's Internal Policies and Practices.

2 Under EY internal standards (which incorporate and expand upon the legal and
3 professional standards), an unlicensed EY employee *cannot*:

- 4 • commit EY to an audit engagement, (LD, ¶10, Ex. H, Borowski Tr. 29:4 - 13,
5 31:5 - 10), or a tax engagement *Id.*, ¶16, Ex. N, DiNicola Tr.: 36:13-23;
- 6 • approve preliminary engagement activities, including the exercise of judgment to
7 assess the potential risk of a potential audit engagement, (*Id.*, ¶10, Ex. H,
8 Borowski Tr., 32:22 - 33:21);
- 9 • approve and sign engagement letters, (*Id.*, 18:25 - 19:9);
- 10 • work without control and supervision of the licensed CPA, (*Id.*, 20:10 - 14);
- 11 • approve or depart from the audit plan/program, (*Id.*, 43:18 - 22, 44:22 - 24, 46:15
12 - 47:24);
- 13 • approve and sign any document containing a substantive opinion, conclusion or
14 determination, including audit opinions, audit reports, internal control opinions on
15 public companies (SOX 404 reviews), or certify financial statements, (*Id.*, 18:15 -
16 24, 20:24 - 21:2, 21:17 - 25, 23:19 - 24:19, 25:12 - 19); or
- 17 • advise client management on matters of significance (*Id.*, 24:22 - 25:11, 26:11 -
18 14).

19 Likewise, it is EY's policy that neither a staff nor a senior titled employee is permitted to
20 deviate from firm policies and procedures. *Id.*, ¶16, Ex. N, DiNicola Tr., 30:15 - 31:6, 94:21 -
21 95:9); ¶21, Ex. S, Garcia Tr., 94:1-9.

22 EY is unable to identify any particular work of the Staff or Senior that reflects authority
23 to make independent choices free from immediate supervision. *Id.*, ¶12, Ex. J, Bryant Tr. 134:8-
24 13; ¶21, Ex. S, Garcia Tr., 96:10 - 97:10.

25 1. Additional Restrictions Imposed on Staff and Seniors in Audit

26 EY utilizes a Global Audit Methodology ("GAM") which establishes guidelines and
27 procedures applied consistently on each audit. LD, ¶10, Ex. H, Borowski⁵ Tr., Vol. I, 27:3 - 13.

28 The GAM requires that:

"All of the audit work, including all of the work papers, is reviewed in detail
and a manager, senior manager, principal, or partner performs *sufficient review*

⁵EY's Partner in charge of the Audit practice in the Pacific Southwest region, and Rule 30(b)(6) witness on
the duties and tasks of Staff and Seniors in Audit.

1 *procedures* to be satisfied that the detailed review was adequate and that
2 appropriate audit recognition was given to the area and to the important
3 financial statement amounts and disclosures pertaining to it.”

4 *Id.*, ¶11, Ex. I, GAM Supp. Guidance, §1.2.4, at EY 039261 -EY039262.

5 The second level review is, in fact a “detailed review” as to all matters determined to be
6 “material” or “significant.” *Id.*, ¶10, Ex. H, Borowski Tr., Vol. II, 262:16 - 264:1. Further, both
7 levels of review effectively are not merely “reviews,” but instead result in the substitution of the
8 “reviewer’s” judgment for that of the staff or senior who performed and documented his work.
9 *Id.*, 264:2 - 266:22.

10 Significantly, the EY second level review referred to in the GAM can only be performed
11 by licensed CPAs, manager level and higher. That means that the work of class members on
12 matters which are material is all done under “detailed” supervision.

13 On “accounts,” (elements in the client financial statements or records such as accounts
14 payable or accounts receivable or cash), which are deemed significant, or matters deemed
15 sensitive or clients presenting high risk, the audit work cannot be performed by Staff and must be
16 performed initially by a Senior level employee and subject to close supervision. “Direct
17 participation means involvement in the actual performance of the work, which may range from
18 *effective direction and supervision*, usually on-site, of team members performing audit
19 procedures to actual performance of some or all procedures. That work, by Seniors is also,
20 subject to a “detailed review” by a CPA, and a second level review, also by a CPA. *Id.*, ¶11, Ex.
21 I, GAM at EY039263-64 and GAM, “Exhibit 1 - Summary of Timely, Direct Executive
22 Participation By Accounting and Auditing Specialist in the Audit”, §1.2.9 at EY039283.

23 The detailed review and second level review are not the only levels of review. On each
24 engagement, the Partner in charge of the engagement must review every material or significant
25 decision, and his decision on such matters substitutes for the judgments of any lower employee
26 who did or reviewed the work. The Partner’s decision is subject to a Second Partner review and
27 often a tax partner review, which are more like actual reviews, where differences of opinion are
28 discussed and resolved. *Id.*, ¶10, Ex. H, Borowski Tr., Vol. II, 256:17 - 260:20.

2. Restriction Imposed on Tax Staff and Seniors.

In the Tax service line, EY is “essentially” in the business of giving tax advice and serving their clients’ tax advice needs. *Id.*, ¶12, Ex. J, Bryant⁶ Tr. 21:25 - 22:4. With respect to providing advice, the policies are determined at the national level, incorporating the professional and other standards, including the IRS’s Circular 230. *Id.*, 25:1-6, 27:6 – 12; see also, IRS Circular 230.

EY’s national policy requires all tax advice to be reviewed. LD, ¶¶13 and 14, Exs, K, EY’s PPS “Reviews Of Tax Advice” and appendices A and B (policy for engagements prior to December 31, 2004) and Ex. L, EY’s PPS Reviews of Tax Advice (for engagements after January 1, 2005) at EY51033-EY51036 and EY052097-EY052099 and EY051037 - EY051046⁷. Any “significant” advice can only be provided with review by at least a Senior Manager (a licensed CPA). *Id.*, at EY052099, EY051039 and EY051043-EY051044.

In rare instances a Staff or Senior may provide “not significant” advice. “Not Significant” advice “...is reserved for the most basic and routine type of advice the firm provides.” *Id.*, at EY051041-42. It is the type of advice that does *not* require, “subject matter professional or industry professional involvement....” *Id.* Even not significant advice must be documented and reviewed by a CPA. *Id.*, at EY052099, EY051039 and EY051042-44.

E. Tasks and Responsibilities of Staff and Seniors.

It is Plaintiff’s position that the pervasive and comprehensive supervision and review required by the law, professional standards and EY internal policies, preclude a finding that any of the Staff or Seniors exercised discretion or independent judgment required for an exemption to apply. Certification of a class in this case does not require the Court to make findings about the specific tasks engaged in by Staff and Seniors. It is, nonetheless, quite clear that the great majority of Staff and Seniors in the tax and audit areas have been performing clerical tasks,

⁶Mr. Bryant is EY’s Federal Tax leader in EY’s Pacific Southwest and F.R.C.P. 30(b)(6) witness on duties and tasks performed by the Staff and Senior in Federal Tax.

⁷While the policy and practice statement was updated for engagements commenced after January 1, 2005, those modification only “enhanced existing policies.” *Id.*, at EY051037.

1 ministerial activities, and simple activities such as comparing two numbers (e.g., one number on
 2 an invoice and another number on the client's records) to make sure they are the same, adding up
 3 columns of figures, and other activities which, standing alone (even without supervision and
 4 review) would not qualify for exemption.⁸

5 1. Staff and Seniors in Audit.

6 At EY the Staff and Senior employees' primary responsibility is to assist CPA's in the
 7 performance of audits. Morris Decl. ¶ 5; Pham Supp. Decl., ¶ 20. Each audit is engaged in a
 8 similar fashion, consistent with the GAM, where the Staff are told which accounts to audit and
 9 which steps to take to do so. Pham Supp. Decl., ¶¶ 23- 24. The Staff are primarily involved in
 10 performing the audit by "testing," either the internal controls or substantive testing. *Id.*, ¶¶ 25 -
 11 27.

12 The tasks involved in "testing" include looking at underlying financial documents, such
 13 as invoices, comparing the numbers on the documents to be sure they match the numbers on the
 14 company's financial records, and adding up the numbers to be sure that the "totals" on the
 15 company's books have been accurately added up. Each of these types of testing is simplistic and
 16 predictable with no discretion in matters of significance. Indeed many of these are basically
 17 comparing of numbers and simple mathematical operations requiring no special or advanced
 18 training.⁹

19 Training for this work is focused on the methods and procedures used for an audit, which
 20 is primarily EY's computer-based audit program called AWS. Pham Supp. Decl. ¶ 11,
 21 Fernandez Decl. ¶ 7. AWS provides the staff and seniors step-by-step instructions on how to
 22 audit particular accounts and a checklist of everything that needs to be done to complete an audit.
 23 Pham Supp. Decl., ¶ 12. The audit plan generates AWS worksheets and directives to be
 24

25 ⁸ Indeed, Plaintiff believes that Defendant does not have records that would allow it to prove its case that
 26 any exemption applied, and to the extent that it had previously conducted a survey on that issue, the "survey" has
 been lost, raising the possibility of an adverse evidentiary presumption.

27 ⁹ See Altobello, Tr. 60: 23 to 61:21, 62:7-19; 63:2 to 64:10; 64:21 to 65:19, 66:2-25, 91:4 to 93:5. Greco
 28 Tr. 89:10 to 91:18 (witness admits his children could add a column of numbers at age 12) Tr. 92:21 to 93:14
 (comparing two numbers does not require accounting training).

1 completed by each of the Staff and Seniors, often in checklist format, with detailed instructions
2 on how each portion of the audit is to be completed, sometimes referred to as "work papers." *Id.*,
3 ¶¶ 28 - 31. Often this simply requires reviewing the prior year's' work papers. *Id.*

4 Interns, who are college students who have not completed their studies, are given this
5 training over a short period and do the same type of work Staff do. Interestingly, EY treats the
6 Interns as not exempt from overtime laws and pays them for overtime. Pham Supp. Decl., ¶¶
7 3-9; Richards Supp. Decl. ¶¶ 26-28; Buckingham Decl., ¶ 3, Estrada Decl. ¶ 3; Fernandez
8 Decl. ¶ 2; LD ¶ 17, Ex. O, Fernandez Tr. 25:5-13; 243:21-244:13, and Dep. Ex. A. Offer Letter
9 at EY031155.

10 Staff and Seniors are never permitted to vary the steps dictated to be performed by AWS.
11 Nor do they have discretion to refuse to follow the audit plan or AWS work paper. Pham Sup.
12 Decl. ¶ 32. Staff and Seniors do not have discretion to decide which audit tests to perform,
13 which accounts to examine, or how many balances or entries to sample as part of the audit. *Id.*
14 Rather, the daily activities of the Staff and Seniors is prescribed by the AWS work paper
15 assigned by a superior. *Id.*

16 The Staff and Senior are *not permitted* to communicate with the engagement client on
17 matters of significance, including the appropriateness of their management policies or general
18 business operations. To ask a question beyond seeking documents or information previously
19 authorized and instructed to obtain, the Staff and Seniors are required to inform the superior of
20 what they want, and the superior then tells them what to ask. *Id.*, ¶ 34.

21 The Staff "rolls" on and off of audit engagements. In doing so, EY treats the staff as
22 fungible production line workers. *Id.*, ¶ 21. The Staff provides no input in planning an audit or
23 which accounts will be audited, and make no decisions regarding the conduct of the audit. *Id.*, ¶
24 22; Fernandez Decl., ¶¶ 2, 6; Dancer Decl., ¶ 5; Driscoll Decl. ¶ 5; Stout Decl. ¶ 5; LD, ¶ 19,
25 Ex. Q, Landon Tr. 127:10 -25; 175:12-17.

Seniors are also effectively fungible production line workers who are told where to go, when to go, what to do and how to do it. Pham Supp. Decl. ¶35. Senior 1 employees may perform the same tasks as Staff 1. Richards Supp. Decl. ¶¶ 29-51.

To a small extent the Seniors may be involved in “planning” an audit but that involvement does not involve any discretion or independent judgment. That task, unless performed by Seniors is either merely copying the plan from the prior year or generating a plan by entering data into a computer program that generates the plan. The plan always is subject to review by a CPA. Rothacker Decl., ¶ 5 at p. 6-7; Morris Decl. ¶5; and Alsehleh Decl., ¶ 5.

GAM's *Supplemental Guidance* expressly sets forth the roles and responsibilities of the personnel in an audit. Staff titled employees *are not even provided formal roles or responsibilities in the GAM*. LD, ¶11, Ex. I, GAM Supp. Guidance, § 1.2.6, at EY039268 - EY039279.

The GAM makes only limited references to the roles and responsibilities of Seniors. *Id.*, at EY039268. All of the duties performed by a Senior are subject to *effective detailed direction and supervision* by a CPA on any matter of significance. *Id.*, GAM Supp. 1.2.9 Exhibit 1, Summary of Timely, Direct Executive Participation by Accounting and Auditing Specialist in the Audit, at EY039283. EY's GAM treats Staff and Seniors uniformly within each category negating any need for individualized inquiry.

2. Staff and Seniors in Tax.

Like audit, the role of the Staff and Seniors in the tax service line is that of a fungible production worker. Prior to 2007 or 2006 the Staff and Seniors were only “labeled” in a particular sub-service line for categorization purposes. In reality, before being promoted to manager, the Staff and Seniors were in a pool of other primarily unlicensed Staff and Seniors where they were pulled on or off of engagements to gain a “diversified” experience in tax and audit. LD, ¶16, Ex. N, DiNicola Tr. 143:14-144:21. Since that time, rather than categorizing the Staff and Seniors as being in a particular sub-service line, EY more accurately categorizes the Staff and Seniors as being in its Diversified Staff Group. *Id.*

1 From this pool of Staff and Seniors, EY uses the Staff and Seniors as inter-changeable
 2 production line workers. When not assigned to a particular engagement, the Staff and Seniors in
 3 the pool put their names on an "unassigned availability list" from which they would be called for
 4 their next assignment. *Id.*, ¶18, Ex. P, Matoza Tr. 89:3-10. As current Senior 2 EY employee
 5 Jacqueline Matoza explained:

6 Staff are plug and play, and anyone tells you otherwise, they're lying to you. I have been
 7 told numerous times, grab any staff.
 8 It doesn't matter. We don't care. Staff do very basic tasks they are told
 9 to do. Seniors simply relay the task from the manager, senior manager,
 or partner to a staff. Very often seniors are doing very similar tasks to a staff...
 Every staff does the same thing, similarly.

10 *Id.*, at 236:19 - 237:14, referencing Depos. Ex. 5, Matoza Decl. Much of the work is clerical
 11 work, both for staff and seniors. Matoza Decl., ¶5; LD, ¶18, Ex. P, Matoza Tr. at 231:9 -
 12 233:15.

13 In tax, the training focused on EY's computerized tax preparation software, GoSystem,
 14 and the program for importing data from its electronic work papers, Analyze Workbook ("AW"),
 15 into the GoSystem. (*Id.*, ¶18, Ex.P, Matoza Tr., 32:6 - 32:24).

16 Because of the standardized clerical manner in which they perform, Staff and Senior
 17 employees in tax describe their roles as consisting almost entirely of providing support, clerical
 18 and data entry tasks that require neither the exercise of independent judgment, discretion,
 19 analysis or intellectual exertion. Taylor Decl., ¶5; DeMille Decl., ¶ 5; Richards Decl., ¶¶ 4, 7-
 20 9; Estrada Decl., ¶ 5; Buckingham Decl., ¶¶ 5-6. It is for this reason, that throughout EY's
 21 offices in California the work is described as "monkey work," meaning it is data entry clerical
 22 work that anybody can do without requiring thought process or, in other words, brainless tasks.
 23 LD, ¶18, Ex. P, Matoza Tr. 217:5 - 218:17; and ¶17, Ex. O, Fernandez Tr. 90:13 - 17.

24 Similar to audit, the Staff and Senior in the Diversified Service Group are told where to
 25 go, what to do and how to do it. The Staff and Seniors receive instructions from their manager
 26 as to the tasks they needed to complete. LD, ¶18, Ex. P Matoza Tr. 50:4-7; 76:9 - 22. Richards
 27 Supp. Decl. ¶52 -57. From there, the Staff and Seniors complete the tasks assigned by
 28

1 primarily collecting information, entering it into spread sheets, referencing the source documents
 2 or simply printing materials and creating binders. *Id.*, 42:14 -44:18 (printing and creating
 3 binders); 79:1 - 11 (data entry for tax returns); LD, ¶3, Ex. A, Richards Tr. 273:12 - 25 and
 4 325:24 -327:4; Richards Supp. Decl. ¶¶ 58 - 61 (locate information, “ticking and tying,” --
 5 checking off all numbers and adding them up -- data entry into either AW or GoSystem,
 6 previously called FastTax); Estrada Decl., ¶ 5(i - vi); DeMille Decl., ¶¶ 5(i -ii), 6-8
 7 (referencing); Buckingham Decl., ¶5(i, ii, v) (data entry, ticking and tying, office clerical work);
 8 Taylor Decl., ¶5(i, ii, iii) (data entry and ticking and tying, preparing binders). All of the work
 9 was then reviewed by a senior manager or higher. LD, ¶18, Ex. P, Matoza Tr. 83:7-84:7.
 10 Richards Supp. Decl. ¶62-63. The members of the Diversified Staff Group were rarely given
 11 authority to speak directly to a client, and usually only to ask for information they are authorized
 12 and told to obtain. Richards Supp. Decl. ¶65.

13 Remarkably those supervising the “exempt” Staff and Seniors in Tax Compliance or
 14 performing the equivalent alternatives in Diversified Staff Group experience receive overtime
 15 compensation for not only supervising but also doing the same work! LD, ¶21, Ex. S, Garcia Tr.
 16 38:23 -42:8; 90:22-91:23 (Ms. Richards' counselor and EY executive director); Richards Supp.
 17 Decl. ¶56.

18 3. FMAs.

19 The partners in California use FMA's to assist primarily in generating and tracking client
 20 invoices similar to non-exempt Finance Assistants, but do not approve or determine what is to be
 21 invoiced, nor do they make any decisions of consequence on how EY operates. Richards Supp.
 22 Decl., ¶¶ 7-21; LD, ¶8, Ex. F, Tr. McGuire 62:17-23; 63:8-20; 64:13-20; 65:17-66:7; 70:7-
 23 72:18; 90:19-25; 92:5-15; 119:9-14. The FMA is support staff (*Id.*, 151:18-20), which is
 24 different than an executive assistant. *Id.*, 129:18-23.

1 III. Legal Argument - The Requirements Of Rule 23 Are Satisfied Here.

2 A. Satisfaction Of Rule 23(a).

3 To obtain class certification, Plaintiffs bear the burden of showing the four requirements
4 of Rule 23(a) and one of the alternatives of Rule 23(b) are met. Fed. R. Civ. P. 23(b); *Dukes v.*
5 *Wal-Mart Stores, Inc.*, 603 F.3d 571, 580, (9th Cir. 2010), citing to *Zinser v. Accufix Research*
6 *Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Here, the Rule 23 (a) requirements of (1)
7 numerosity, (2) commonality, (3) typicality and (4) adequacy of representation are satisfied.

8 **Numerosity.** Rule 23(a)(1) requires that “the class is so numerous that joinder of all
9 members is impracticable.” While there is no specific number required for numerosity, a
10 putative class of hundreds satisfies this requirement. *Bates v. United Parcel Service of America,*
11 *Inc.*, 204 F.R.D. 440, 444 (N.D. Cal. 2001) (460 employees). Here, EY’s responses to
12 interrogatories reflect that class members in the audit and tax lines substantially meet the
13 numerosity requirements, as the potential is in excess of 4,000 members. LD, ¶¶22 and 23, Ex.
14 T, EY’s Responses and Supplemental Responses to Plaintiff’s Third Set of Interrogatories No.
15 3¹⁰; and Ex. U, EY’s Supplemental Response to Landon’s Interrogatory, No. 1(b). FMAs have
16 ranged from 30 to 36 individuals in that position per year since 2004. *Id.*, ¶24, Ex. V, EY’s
17 response to Richards’ Interrogatory no. 1. Numerosity appears unchallenged.

18 **Commonality.** Rule 23(a)(2) requires that there be some question of law or fact
19 common to the class as a whole. Commonality is “construed permissively,” and its requirements
20 are deemed “minimal.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1988). “All
21 questions of fact and law need not be common to satisfy the rule. The existence of shared legal
22 issues with divergent factual predicates is sufficient.” *Hanlon*, 150 F.3d at 1019.

23 Here, as in *Brady* where class certification was granted, common questions of law
24 include: whether the professional exemption under California law requires a license for
25 accountants and whether accounting is a “learned profession” under California Wage Order 4-

26
27 ¹⁰Interestingly, although Defendant attempts to create non-commonality by providing the categorization of
28 the Staff and Senior in various sub-practice groups, it does not differentiate between Seniors 1 and 2. Likewise, EY
fails to reflect the Diversified Staff Group in place since the Fall of 2006.

2001. *Brady*, 2010 U.S. Dist. Lexis 37820, *10-11. Plaintiffs' argument here also raises the question as to whether the system of supervisors and "review" precludes a finding that any Staff or any Senior can be found to exercise the required discretion and independent judgment. *Brady* also ruled that whether the actual tasks of audit employees qualified for the relevant exemptions raised a common question of law.

Commonality is readily satisfied where a "lawsuit challenges a system wide practice or policy that affects all of the putative class members." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001). Common factual questions here include: whether EY's standardized policies and procedures prevent the class members from customarily and regularly exercising discretion and independent judgment with respect to matters of significance; whether EY categorically classified all class members as exempt¹¹; whether EY required class members to work overtime; whether the class members, who assist licensed CPA's, are producers of a service commodity under the "administrative/ production worker dichotomy" and for this reason are improperly classified as exempt administrative employees; whether the class members can be said to run the businesses of EY's clients or determine their overall course or policies fifty-one percent of the time; whether EY provided itemized statements to class members accurately recording their total hours worked and their gross and net pay as required by California Labor Code § 226; whether EY promptly paid all wages due to class members when discharged or who resigned pursuant to California Labor Code § 203; whether California Labor Code § 218.6 entitles the class members to mandatory interest at ten (10) percent per annum; whether EY maintains time records showing the hours worked by class members and whether these records can be used to produce formulaic calculations of the class members' damages.

¹¹EY has already answered this affirmatively in response to interrogatories. LD., ¶23, Ex. U, EY's Supplemental Response to Landon Interrogatory No. 1(a). Of course, this common question includes the subsidiary question as to the reason for the categorical classification which appears not to be based on any individual studies of what class members actually do, but rather solely a desire to compete with a competitor. *Id.*, ¶ 4, Ex. B, Atlobello Tr., 5:5 - 6:4; 18:6 - 20:25; 23:8 - 19; 33:19 - 34:12; 37:10 - 38:21; 41:2 - 42:20; 44:12 - 23; 50:17 - 51:19; 93:18 - 94:7; Depos. Exs. 300 and 301 (explaining that like all Staff and Senior employees in the audit function in the United States, Fernandez was classified as exempt not because of some analysis of her actual job duties or a time-and-motion study to assess what percentage of her job duties met any potential exemption, but rather as a decision sometime in the 1990's to simply compete with a competitor that had stopped paying overtime); and ¶10, Ex. H, Borowski Tr., 70:18 - 71:12, (no time and motion study).

1 **Typicality.** Rule 23(a)(3) requires that “the claims or defenses of the representative
 2 parties are typical of the claims or defenses of the class.” In the Ninth Circuit, “[u]nder the rule’s
 3 permissive standards, the representative claims are ‘typical’ if they are reasonably co-extensive
 4 with those of absent class members; they need not be substantially identical.” *Staton v. Boeing*
 5 *Co.*, 327 F.3d 938, 957 (9th Cir. 2003), quoting *Hanlon*, 150 F.3d at 1020. This requirement is
 6 typically satisfied where, as here, the challenged conduct is a policy or practice that affects all
 7 class members. *Armstrong v. Davis*, 275 F.3d 849, 868-869 (9th Cir. 2001). Each of the
 8 different job categories do not need a class representative to satisfy typicality. *See Staton*, 327
 9 F.3d at 957. Typicality “does not mean that the claims of the class representative must be
 10 identical or substantially identical to those of the absent class members.” 8 Alba Conte &
 11 Herbert B. Newberg, *Newberg on Class Actions*, §24:25 at 24-149 (4th ed. 2002). The claims of
 12 Fernandez and Richards are reasonably co-extensive with those of the putative class; and,
 13 therefore, typical of other class members for at least three reasons: they challenge the same
 14 uniform course of employer conduct; they are proceeding on the same legal theories; and they
 15 seek the same remedies.

16 **Adequacy of Representation.** Rule 23(a)(4), requires plaintiffs to show that “the
 17 representative parties will fairly and adequately protect the interests of the class.” Generally, this
 18 is a two-part inquiry: “(1) [d]o the representative plaintiffs and their counsel have any conflicts of
 19 interest with other class members, and (2) will the representative plaintiffs and their counsel
 20 prosecute the action vigorously on behalf of the class?” *Staton*, 327 F.3d at 957.

21 Plaintiffs’ attorneys are members in good standing of the California state bar and this
 22 Court with extensive experience in prosecuting complex litigation and class actions in state and
 23 federal court, including substantial wage and hour cases.¹² Satisfying Fed. Rule Civ. Proc.
 24 23(g)(1)(C), Plaintiffs’ counsel have: diligently identified and investigated potential claims in
 25 this litigation; extensive experience in prosecuting class actions; demonstrated an adequate
 26

27 ¹²Relevant class action and wage and hour experience is presented in the Declaration of H. Tim Hoffman
 28 previously filed with the request to appoint Hoffman & Lazear as interim lead counsel (Dkt. # 186).

1 understanding of the applicable law; and possess the necessary resources to fully represent the
2 class throughout this litigation.

3 The proposed class representatives have and will continue to vigorously prosecute this
4 action on their own behalf and on behalf of the proposed class. They have answered written
5 interrogatories and attended depositions. The proposed class representatives are proceeding
6 under the same legal theories as the class and seek full payment for all alleged violations. Under
7 these circumstances, no conflict will arise between plaintiffs and the proposed class they seek to
8 represent, and they will continue to adequately represent the entire class. Richards Supp. Decl.,
9 ¶ 67.

10 B. This Matter Satisfies The Certification Requirements of Rule 23(b)(3).

11 For certification under Rule 23(b)(3), a class must satisfy two conditions beyond those of
12 Rule 23(a). “[C]ommon questions must ‘predominate over any questions affecting only
13 individual members,’ and class resolution must be ‘superior to other available methods for the
14 fair and efficient adjudication of the controversy.’” *Hanlon*, 150 F.3d at 1022 quoting Fed. R.
15 Civ. P. 23(b)(3). In *Hanlon*, the court went on to explain, “[w]hen common questions present a
16 significant aspect of the case and they can be resolved for all members of the class in a single
17 adjudication, there is clear justification for handling the dispute on a representative rather than on
18 an individual basis.” *Id.*, at 1022 (internal quotation marks and citations omitted). In doing so,
19 the court is “not only at liberty to, but must, perform a rigorous analysis to ensure that the
20 prerequisites of Rule 23 have been satisfied,...” *Dukes*, 603 F.3d at 594.¹³

21 Courts do not, however, consider the evidence for purposes of determining which party is
22 likely to prevail on the merits. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1978). “It
23 is error to base a class certification decision on whether the plaintiffs could prove the merits
24 rather than whether their claims implicate common questions of law or fact.” *United Steel*
25 *Workers v. ConocoPhillips Co.*, 593 F.3d 802, 808-809 (9th Cir. 2010) Rather, “...the purpose of

26 ¹³There is no dispute that EY treats all class members uniformly. One Court noted inherent unfairness of
27 an employer claiming a lack of predominance when it does not engage in any type of individualized inquiry of
28 whether any employee is actually performing exempt duties. *Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602,
603 (C.D. Cal. 2005).

the inquiry at this stage remains focused on, for example, common *questions* of law or fact under Rule 23(a)(2), or predominance under Rule 23(b)(3), not proof of answers to those questions or the likelihood of success on the merits.” *Dukes* 603 F.3d at 590 (citing to *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S.147 at 158 (1982), emphasis in the original, and *United Steel Workers*, 593 F.3d at 808-809.

“The mere presence of potential individual issues does not defeat the predominance of common questions.” *Westways World Travel, Inc. v AMR Corp.*, 218 F.R.D. 223, 239 (C.D. Cal. 2003) (quoting *McFarland v. Memorex*, 96 F.R.D. 357, 363-364 (N.D.Cal.1982)). EY undoubtedly will provide declarations and other evidence to support a claim of variation among the tasks performed, but those tasks are a single set of tasks all subject to EY’s policies and professional and legal requirements. Because the policies and professional and legal requirements apply “across the board” the proposed class is sufficiently cohesive to warrant adjudication by class representation. *Amchem Products, Inc., v Windsor*, 521 U.S. 591, 623 (1997). Accordingly, class actions focused on common employer practices are appropriate for class certification under Rule 23(b)(3). See e.g., *Campbell*, 253 F.R.D. 586, 605 (E.D.Cal.2008); (unlicensed audit employees) *Brady*, 2010 U.S. Dist. Lexis 37820 at *21 (same); *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 490 (E.D.Cal.2006); *Tierno v. Rite Aid Corp.*, 2006 U.S. Dist. Lexis 71794 at *32.

1. Common Proof Establishes EY Uniformly Classifies Staff and Senior As Exempt.

First, common proof establishes EY uniformly and without variation classifies the unlicensed Staff and Seniors as exempt. LD, ¶23, Ex. U, EY’s Supplemental Response to Landon Interrogatory no. 1. It is for this reason that where exemption is a common defense, class adjudication is supported. *Alba v. Papa John’s USA, Inc.*, 2007 U.S. Dist. Lexis 28079 at *38-39.

Second, the employer’s realistic expectations and the actual overall requirements of the job are susceptible to common proof. *Sav-On Drug Stores, Inc., v. Sup. Ct.*, 34 Cal.4th 319, 336-

337 (2004). Here, EY readily admits a uniform and unvarying determination that all class members are exempt based on its own expectations of the job duties.

2. Common Proof Demonstrates Employer Expectations.

EY acknowledges that the Staff and Senior employees perform substantially the same activities not only in California but throughout the entire United States at their respective level of experience. LD, ¶9, Ex. G, Greco¹⁴ Tr., 5:21- 6:13, 10:6 - 14; 37:13- 39:18. It is EY's expectation that the job duties to be performed by the Staff and Seniors, regardless of whether the service line is tax, audit or another, are consistent across the United States. This includes the expectation as to the amount of discretion that the Staff and Seniors exercise. *Id.*, 55:3 - 56: 19. Likewise, the amount of independent judgment and discretion expected of Staff and Seniors, if any, is consistent across all service lines throughout the United States. *Id.*, 56:20 - 58:16, 59:2 - 60:4.

3. Common Proof Demonstrates that None of the Statutory Exemptions Apply.

(a) None of the Class Members Customarily and Regularly Exercise Discretion and Independent Judgment.

California Labor Code § 515 provides, "[t]he Industrial Welfare Commission may establish exemptions from the requirement that an overtime rate of compensation be paid." The regulation for the professional exemption is found in IWC Order No. 4-2001, and is also published in the California Code of Regulations at Title 8, Section 11040.

Each of the potentially applicable exemptions requires defendant to prove that class members "customarily and regularly" exercised discretion and independent judgment. Cal. Code Regs., Tit. 8, § 11040(1)(A)(3)(c) (Professional /Learned Profession Exemption) Cal. Code Regs., Tit. 8, § 11040(1)(A)(2)(b) Administrative Exemption), Cal. Code Regs., Tit. 8, § 11040(1)(A)(1)(d) (Executive Exemption). EY is required to prove the basis for an exemption, but its policies and practices prohibit class members from exercising the required discretion or judgment.

¹⁴Mr. Greco is EY's Director of Total Rewards for Americas, responsible for compensation, benefits and HR policies, including compliance with labor laws within California and other states of the United States and federal labor laws.

1 Plaintiffs need not prove that class members do not exercise any skill or care in
2 performing their duties. The authorities are careful to distinguish “between the exercise of
3 discretion and independent judgment, and the use of skill in applying techniques, procedures or
4 specific standards.” *Brock v. On-Shore Quality Control Specialists, Inc.*, 107 Lab. Cas. ¶34,
5 972, 1987 WL 31308 (W.D. Tex. 1987). *Nordquist v. McGraw-Hill Broadcasting Company,*
6 *Inc.*, 32 Cal. App. 4th 555, 564, (1995) citing to the D.L.S.E. Manual, states:

7 “The most frequent cause of misapplication of the term ‘discretion and
8 independent judgment’ is the failure to distinguish it from the use of skills and
9 knowledge. An employee who merely applies his or her knowledge in following
10 prescribed procedures or in determining which procedures to follow, or who
determines whether specified standards are met ... is not exercising discretion and
judgment of the independent sort associated with administrative work.”

11 *Nordquist* further instructs that it is not considered the exercise of discretion and
12 independent judgment when an employee is making decisions at a level that is not sufficient to
13 qualify for an exemption. *Id.*, at 564. *Nordquist*, acknowledges that all employees are required
14 to use some discretion, but the bookkeeper who decides which ledger to post first, is not making
15 a decision important enough to count *Id.*, 564.

16 As shown, the kinds of decisions that class members routinely had to make rarely, if ever,
17 involved specialized skills or expertise, and when they did, their “discretion” and judgments
18 were not sufficiently “independent” because of the pervasive and comprehensive supervisory and
19 “review” scheme. The DSLE Manual in its 2002 update at § 52.3.12 requires that “ [t]he
20 discretion and independent judgment exercised must be real and substantial, that is, they must be
21 exercised with respect to matters of consequence.” Further, “[e]xercising discretion and
22 independent judgment with respect to matters of consequence must be distinguished from
23 making decisions which can lead to serious loss due to ... the improper application of skills,
24 failure to follow instructions or procedures, or negligence.” *Id.*, at § 52.3.8.3. This means an
25 employee cannot be classified as exempt merely because her work is “important” since a failure
26 to perform her job properly could have catastrophic results for the employer. It is the nature of
27
28

1 the work, not its consequences, which is determinative. *Shaw v. Prentice Hall*, 977 F.Supp. 909,
2 915 (S. D. Ind. 1997).

3 Predominance of common issues is found where, as here, the common question presents
4 a "significant aspect" of the case. *Hanlon*, 150 F.3d at 1022. It is for this reason that
5 "predominance is determined not by counting the number of common issues but weighing their
6 significance." *Wamboldt v. Safety-Kleen Systems, Inc.*, 2007 U.S. Dist. Lexis 65683 at *34
7 (N.D.Cal.2007). "Where...there is evidence that the duties of the job are largely defined by
8 comprehensive corporate procedures and policies, district courts have routinely certified classes
9 of employees challenging their classification as exempt, despite arguments about 'individualized'
10 differences in job responsibilities." *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152 (S.D.N.Y.
11 2008).

12 (b) Common Proof Demonstrates That The Other Requirements of Professional
13 Exemption Cannot Be Satisfied.

14 To support a claim of exemption it is the employer's burden to establish all the
15 requirements of at least one applicable exemption. See Cal. Labor Code § 515; Cal. Code Reg.,
16 Tit. 8, § 11040; *Nordquist, supra* 32 Cal.App.4th at 562 ("[t]he employer bears the burden of
17 proving an employee is exempt.") EY contends that the unlicensed Staff and Seniors qualify for
18 the professional exemption. LD, ¶23, Ex. U, EY's supplemental response to Landon
19 interrogatory no. 1. This represents a common question on a "significant aspect" of the case. It
20 can be resolved for all class members in a single adjudication. *Hanlon*, 150 F.3d at 1022.

21 The regulation for the professional exemption begins: "A person employed in a
22 professional capacity means any employee who meets *all* of the following requirements...." Cal.
23 Code Regs., Tit. 8, § 11040(1)(A)(3) (emphasis added). The first of these requirements provides
24 that the individuals employed in the profession of accountancy must be licensed to qualify for
25 the professional exemption. *Id.*, at 11040(1)(A)(3)(a). Here, the class is defined not to include
26 any members who are licensed as either CPA's or attorneys.¹⁵ As a result, class-wide proof of

27 ¹⁵Where class members obtain their license as a CPA or attorney while a Staff or Senior, the only effect is
28 that their participation is limited to the unlicensed period, which is readily determined from EY's employment
records and the date, if any, that a license was issued. See *Whiteway v. Fedex Kinko's Office and Print Services*,

1 either having a license or not having a license is available to answer the keystone question of
 2 whether class members qualify for the professional exemption.

3 The issue of whether the governing statute and regulation require a license in a
 4 recognized profession is a matter of statutory construction¹⁶. For purposes of deciding whether
 5 the class should be certified, this is a "significant aspect" of the case supporting predominance.
 6 See *Campbell*, 253 F.R.D. 586, 597 and 599; *Brady*, 2010 U.S. Dist. Lexis at *20-21. Here, as in
 7 *Campbell* and *Brady*, it is expected EY will assert that the variation in the duties performed by
 8 the unlicensed Staff and Senior prevent the establishment of predominance under the second
 9 avenue of the professional exemption, the "learned profession exemption." Regardless of
 10 whether it is permissible to foster internal inconsistency interpreting the regulation by ignoring
 11 the first avenue of the professional exemption, requiring a license, in favor of the second avenue,
 12 the learned profession exemption, the applicability or inapplicability is, "a common predominate
 13 question." *Campbell*, 253 F.R.D. 586 at 597.

14
 15 (c) Common Proof Establishes That The Other Requirements of Administrative
Exemption Cannot Be Satisfied.

16 In order to establish that the Staff and Seniors are administratively exempt from the
 17 applicable wage and hour laws, EY must prove that their actual job duties require them to spend
 18 more than fifty percent of their time performing work directly related to Defendant's
 19 management policies or its general business operations. Cal. Labor Code § 515; 8 Cal. Code
 20 Reg., § 11040.

21 In order to qualify for the exemption, the work must be directed to "matters that involve
 22 policy determinations, i.e., how a business should run or run more efficiently, not merely
 23

24
 25 *Inc.*, 2006 U.S. Dist. Lexis 69193 at *19-20.

26 ¹⁶After class certification in *Campbell*, the statutory interpretation of IWC Order No. 4-2001, regarding
 27 whether the first avenue of the professional exemption requiring a license can be ignored to qualify the unlicensed
 28 Staff and Seniors under the second avenue (learned profession), was exhaustively examined. That affirmative
 defense and the administrative exemption were determined in favor of the Plaintiff employees on summary
 judgment. *Campbell*, 602 F.Supp.2d 1163 (E.D.Cal. 2009). That summary judgment order is currently pending
 before the Ninth Circuit. (Docket No. 6, No. 09-80059).

1 providing information in the course of the customer's daily business operations." *Bratt v. City of*
 2 *Los Angeles*, 912 F. 2d 1066, 1070 (9th Cir. 1990). The decisions that qualify an employee for the
 3 exemption must be more than "those small discretions which normally inhere in" the type of
 4 work one does. *Hodgson v. Penn Packaging Co.*, 335 F.Supp. 1015, 1021 (E. D. Penn. 1971);
 5 *Rothman v. Publiker Industries, Inc.*, 201 F.2d 618, 620 (3d Cir. 1953). Rather, it must be
 6 shown that the employee is truly exercising independent judgment and that he is doing so with
 7 respect to decisions that truly affect the administration and operation of the employer's business.

8 The "duties" test is used to determine whether the job duties of an employee are actually
 9 "administrative" in nature. Specifically, the duties test requires that the employee be engaged in
 10 "the performance of office or non-manual work directly related to management policies or
 11 general business operations of his/her employer or his/her employer's customers." 8 Cal. Code
 12 Regs., § 11040 (1)(A)(2)(a)(i). To qualify for the administrative exemption the employee must
 13 be "primarily engaged in duties that meet the test of the exemption." *Id.*, at 1(A)(2)(f). In
 14 California, this means that more than fifty (50) percent of the employee's work time must be
 15 spent engaged in exempt work. *Nordquist, supra*, 32 Cal. App. 4th at 563.

16 California law uses the administrative/production worker dichotomy, therefore, as a
 17 "core" concept to assess the administrative exemption. *Bell v. Farmers Insurance Exchange*, 115
 18 Cal. App. 4th 715, 728 (2004). "The phrase 'directly related to management policies or general
 19 operations of the business of the employer or the employer's customers,'" is limited to those
 20 activities related to the administrative operations and is distinguished from "production" work.
 21 DSLE Manual at § 52.3.7.1. The administrative/production worker dichotomy distinguishes
 22 between employees whose primary duties directly relate to management policies or general
 23 business operations of the employer or its customers and employees whose primary duty is
 24 producing the commodity or commodities, whether goods or services, that the enterprise exists to
 25 produce and market. *Id.*, at 729, citing *Dalheim v. KDFW-TV*, 918 F. 2d 1220, 1230 (5th Cir.
 26 1990). The California Division of Labor Standards Enforcement Policies and Interpretations
 27 Manual ("DSLE Manual") in its 2002 update at § 52.3.5 summarizes the law as follows:
 28

1 “...[r]ecent appellate decisions make it clear that the administrative exemption applies
 2 only to those employees whose primary duty is administering the business affairs of the
 3 enterprise rather than producing the goods and services that the enterprise exists to
 4 produce and market.” Further, “[n]umerous recent cases have confirmed that the
 5 ‘production’ vs. ‘administration’ dichotomy applies not only to manufacturing settings but
 6 also to settings in which the ‘product’ consists of services.”

7 DSLE Manual at § 52.3.5 (2002 update). In other words, the administrative exemption applies
 8 only to administration, not to individuals – even important individuals – involved in producing
 9 the goods or services sold by the employer.

10 Clearly, the Staff and Seniors in the audit line of business are engaged in the
 11 “production” of audit services to clients. As to tax services, the administrative/production
 12 dichotomy logically leads to the conclusion that the Staff and Seniors do not spend anytime
 13 “running” the business of EYs’ clients. In fact, the rules of independence governing accountancy
 14 prohibit even licensed professionals from functioning as administrators of its engagement clients.

15 EY is required to be independent from the engagement client not only in producing audits
 16 and tax advice, but also to avoid operating or managing its clients. “Independence is inherent in
 17 everything EY does.” *Id.*, ¶15, Ex. M, PPS Independence, at EY051505. As such, EY does not
 18 (1) determine client policies or overall course of conduct of the client, (2) act as the administrator
 19 of the engagement client or (3) act in a management capacity for the client. This rule is stated in
 20 every engagement letter as a matter of course. *Id.*, ¶16, Ex. N, DiNicola¹⁷ Tr. 88:16 – 90:24;
 21 ¶21, Ex. S, Garcia Tr. 89:23-90:16. Because of required independence, EY cannot claim the
 22 administrative exemption on the basis of administering the clients’ businesses. EY simply
 23 provides advice for a fee. *Id.*, Tr. 88:13-18. It is also undisputed that Staff and Seniors do not
 24 spend any time providing advice to Defendant’s clients and cannot do so. They are neither
 25 licensed to do so nor permitted to do so by the AICPA Code of Professional Conduct or
 26 Defendant’s internal policies.

27 Similarly, the “discretion” which an employee must be found to exercise to meet the
 28 administrative exemption must involve the authority to make basic decisions that affect the

¹⁷Mr. DiNicola is Defendant’s State and Local Tax Service Line Leader Pacific Northwest and Pacific Southwest, Defendant’s Fed. R. Civ. Proc., Rule 30(b)(6) witness on the duties, responsibilities, and actual job activities of the Staff and Senior titled employees in its State and Local Tax practice.

1 fundamental operation of the enterprise in question without seeking guidance from superiors as a
 2 matter of course." *Hashop v. Rockwell Space Operations Co.* 867 F. Supp. 1287, 1298 (SD Tex.
 3 1994.) Indeed, one necessary feature of discretion and independent judgment is that it "implies
 4 the person has authority or power to make an independent choice, free from immediate direction
 5 or supervision and with respect to *matters of significance*. 29 C.F.R. § 541.207.

6 Duties of footing and tying, testing, documenting, inputting data and counting not only
 7 lack any specialized skill, but are also prescribed in detailed plans in either the AWS for audit or
 8 the GoSystem for tax. The common proof shows the class is performing basic production work.

9 No matter how EY attempts to characterize class members' positions, and the actions they
 10 are instructed to take, the jobs simply do not require the exercise of independent judgment on
 11 matters of significance concerning Defendant's general business operations. Class members have
 12 no individual discretion and no opportunity to make significant or complex decisions. The class
 13 members simply follow directions on each audit and tax assignment. Their tasks are properly
 14 classified within Defendant's production operations, not within its administrative operations.
 15 *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1230 (5th Cir. 1990). Moreover, the class members have
 16 no real opportunity to exercise independent judgment and discretion. At most, the decisions
 17 made by the class members are simply "those small discretions which normally inhere in" their
 18 type of work. *Hodgson v. Penn Packaging Co.*, 335 F.Supp. 1015, 1021 (E. D. Penn.1971).

19 The class positions, by common proof, thus fail to fulfill either of the requirements that
 20 must be met in order to qualify for an administrative exemption. The responsibilities do not
 21 relate generally to the administrative or general business aspects of Defendant's operations, and
 22 they do not regularly require the exercise of independent judgment or discretion.

23 4. Common Proof Establishes That The Other Requirements of the Executive 24 Exemption Cannot be Satisfied

25 GAM itself defines "executives" as those employed as managers and above. *Id.*, GAM
 26 Supp., 1.2.2 at EY 039258. EY cannot demonstrate that any staff or seniors are subject to the
 27 executive exemption from overtime, since none spend more than fifty (50) percent of their time
 28 supervising other Staff or Seniors. EY, as a matter of policy, Employee Performance Problems

1 reserves counseling of performance for the Manager through Partner. LD., ¶20, Ex. R, PPS
 2 Guideline For Effectively Handling Employee Performance Problems," at EY051487 -
 3 EY051490.

4 5. Other Common Issues Predominate.

5 A resolution of the central underlying issue of the applicability of the claimed exemptions
 6 will lead to simple class-wide resolution of the other primary issues in the case. The amount of
 7 overtime and the proof of damages can be readily obtained from EY's timekeeping records in a
 8 formulaic calculation. *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975). Eligibility for
 9 waiting penalties under Cal. Labor Code § 203 will necessarily follow from a finding of unpaid
 10 overtime. The relationship between the failure to pay overtime and nonpayment under §203 has
 11 been recognized by the courts. *Ghoury v. Al-Lahham*, 209 Cal.App.3d 1487, 1492 (1989).
 12 Liability for failure to maintain accurate records under California Labor Code § 226 will be
 13 based on EY's intentional failure to maintain accurate time records for employees that it
 14 misclassified as exempt. *See Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949,954-955,
 15 960-961 (2005). California Labor Code § 218.6 provides, "the court shall award interest on all
 16 due and unpaid wages at the rate of interest specified in subdivision (b) of Section 3289 of the
 17 Civil Code, which shall accrue from the date the wages are due..." Whether mandatory interest is
 18 due on one or more of the class claims is a common issue. Further, an order that earned wages
 19 be paid as restitution is a permissible remedy under Business & Professions Code § 17203.
 20 *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal.4th 163, 177 (2000). The same common
 21 proof and reasons that establish the overtime violation will establish the UCL claims.

22 C. Class Resolution Is Superior.

23 Rule 23(b)(3) also requires that class resolution be "superior to other available methods
 24 for the fair and efficient adjudication of the controversy." By analyzing the four factors in Rule
 25 23(b)(3)(A-D), the relevant inquiry is whether the objective of the class procedure will be
 26 achieved.

1 **Rule 23(b)(3)(A).** The initial factor evaluated is “the interest of members of the class in
 2 individually controlling the prosecution or defense of separate actions.” This focuses on the
 3 ability of class members to pursue their claims on an individual basis. *Valentino v. Carter-*
 4 *Wallace, Inc.*, 97 F.3d 1227, 1234-1235 (9th Cir. 1996). “A class action is the superior method
 5 for managing litigation if no realistic alternative exists.” *Id.* No such alternative exists here.

6 First, class members are likely to fear reprisal or otherwise be disinclined to pursue
 7 individual claims against their employers. *See Scott v. Aetna Services, Inc.* 210 F.R.D. 261, 268
 8 (D. Conn. 2002). A class action protects “the rights of those reluctant or unable to file individual
 9 actions against the defendants for fear of jeopardizing continuing necessary relationships.”
 10 *Abron v. Black & Decker (U.S.), Inc.*, 654 F.2d 951, 973 (4th Cir.1981) (cases cited therein).

11 Second, the cost of individual litigation against a well-funded defendant is cost
 12 prohibitive. *See Scott*, 210 F.R.D. at 268. Both of these reasons underlie the fundamental
 13 principle that class actions are needed to vindicate the rights of groups of people who otherwise
 14 lack the effective wherewithal to hale the opponent into court. *See Alchem*, 52 U.S. at 617.

15 In overtime cases, these reasons have more recently been set forth by the California
 16 Supreme Court, including: vindication of the public policy underlying overtime laws; the desire
 17 to spread employment through the workforce; avoidance of the evil of overwork; the amount of
 18 recovery relative to the cost of individual litigation; risk of retaliation for individual lawsuits; the
 19 employees’ absence of awareness of their legal rights; and the need for effective enforcement to
 20 deter employers from profiting.¹⁸ *Gentry v. Superior Court*, 42 Cal.4th 443, 455-465 (2007).

21 **Rule 23(b)(3)(B).** The second factor to be considered is the “extent and nature of any
 22 litigation concerning the controversy already commenced by or against the members of the
 23 class.” Plaintiffs’ counsel is unaware of any other current litigation in California against EY to
 24

25 ¹⁸By treating all its unlicensed Staff and Seniors as exempt, EY has profited in the order of millions of
 26 dollars by not paying substantial amounts of overtime, with virtually no deterrent from its entry-level employees
 27 who are reluctant to take on a Goliath-like employer. This is true even if they do not stay at EY, since these
 28 employees are less secure in their future ability to find employment if they are tarnished as being litigious. Absent
 the effective deterrent of the class action, EY will have a strong economic incentive to continue its conduct without
 regard to its legality.

1 recover for the claims of the class. The lack of other litigation supports a finding of superiority.
2 *Zinser*, 253 F.3d at 1191.

3 **Rule 23(b)(3)(C).** The third factor is the “desirability or undesirability of concentrating
4 the litigation in the particular forum.” The present matter has been focused here, and has
5 involved three separate dispositive motions that have resulted in the dismissal of certain claims.
6 Continuing the litigation here is desirable because the Court and the parties are fully engaged in
7 litigating the significant issues raised by the proposed class action.

8 **Rule 23(b)(3)(D).** Finally, courts consider “the difficulties likely to be encountered in the
9 management of a class action.” *In re Seagate Technologies II Securities Litigation*, 843 F.Supp.
10 1341, 1352 (N.D. Cal. 1994). “[D]ifficulties in the management of class actions should not lead
11 to a conclusion that class actions are not superior to other available means for the fair and
12 efficient adjudication of the controversy. Manageability problems are significant only if they
13 create a situation that is less fair and efficient than other available techniques.” *In re Sugar*
14 *Industry Antitrust Litigation*, 73 F.R.D. 322, 358 (E.D.Pa.1976). Manageability is rarely, if ever,
15 in itself sufficient to prevent class certification. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1272 (11th
16 Cir.2004). The Ninth Circuit has longed recognized that “[w]here class-wide litigation of
17 common issues will reduce litigation costs and promote greater efficiency, a class action may be
18 superior to other methods of litigation.” *Valentino*, 97 F.3d at 1234.

19 Here, substantial efficiencies and economies are obtained where the alleged wrongs can
20 be proven by common evidence and then remedied by reversing the unlawful computations in
21 EY's payroll system, and, in doing so, correctly and accurately compute the amount of wages due
22 and mandatory interest.
23
24
25
26
27
28

1 IV. Conclusion.

2 Plaintiffs request that the court enter an order: (1) certifying the proposed class, (2)
3 appointing Sarah Fernandez and Michelle Richards as class representatives and (3) appointing
4 Hoffman and Lazear, Thierman Law Firm and Folkenflik and McGerrity as class counsel.

5 Dated: August 20, 2010

HOFFMAN & LAZEAR

6
7
8 By: 

Ross L. Libenson

9 Attorneys for Plaintiffs
10 Sarah Fernandez and Michelle Richards
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28